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No. 85-1337

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

STATE OF NORTH CAROLINA

Petitioner,

v.

WILLIAM HARBISON, JR.

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of North Carolina

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

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QUESTION PRESENTED

WHETHER THE NORTH CAROLINA SUPREME COURT CORRECTLY CONCLUDED THAT IT IS ESSENTIAL TO OUR ADVERSARIAL CRIMINAL PROCESS THAT ANY DECISION TO CONCEDE GUILT -- WHETHER FORMALLY BY PLEA OR FUNCTIONALLY BY ARGUMENT TO THE JURY -- BE MADE BY THE ACCUSED AND NOT, AS HERE, BY A LAWYER IN DIRECT CONTRAVENTION OF HIS CLIENT'S EXPRESSED WISHES.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 85-1337

STATE OF NORTH CAROLINA, Petitioner,

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To The Supreme Court of North Carolina

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of North Carolina, reported at 315 N.C. 175, 337 S.E.2d 504 (1985), is reproduced in the Petitioner's Appendix. (Pet. App. A1-A7)

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 30, 1985.[1] The State's petition for writ of certiorari, invoking the jurisdiction of this Court under 28 U.S.C. 1257, was filed on February 8, 1986.

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[1]The opinion of the Supreme Court of North Carolina was filed on December 10, 1985. The judgment of the Court (as well as the Court's mandate) is entered twenty (20) days after the date of the filing of the opinion. N.C. R. App. P. 32.

CONSTITUTIONAL PROVISIONS INVOLVED

In the Supreme Court of North Carolina, the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution were asserted by the Respondent.

U.S. Const. Amend. VI provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, Sec. 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Const. Art. I, Sec. 19 provides:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subject to discrimination by the

State because of race, color, religion, or national origin.

N.C. Const. Art. I, Sec. 23 provides:

> In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

STATEMENT

On May 3, 1984, William Harbison, Jr., filed a pro se motion for appropriate relief in the Superior Court for Burke County alleging that he was denied effective assistance of counsel at his 1976 trial for homicide and felonious assault. (Pet. App. A42-A46) Harbison's verified pleading focused upon the closing argument of John H. McMurray, his court-appointed counsel. McMurray, it was alleged, conceded that the defendant was not innocent and indeed deserved punishment. "I don't feel," McMurray allegedly said, "that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." (Pet. App. A44-A45)

That closing argument came as a surprise to Harbison, whose plea had been not guilty because he steadfastly maintained that he acted in self-defense and deserved no punishment at all. Harbison admitted firing several shots at a vehicle driven by Danna Franklin, a periodic girlfriend, and it was shown that the shots wounded Franklin and killed a passenger, Morris Hardy. But Harbison, who

testified, denied that it was the cold-blooded killing of a perceived rival suitor suggested by the prosecution.

The event, according to the defense, arose in a decidedly different way. Harbison and Franklin had taken to meeting clandestinely on secluded backroads to hide their interracial relationship. Often, they would signal their desire to get together by flashing the lights of their cars at one another when they would pass on the local streets. On the night in question, Harbison saw the lights of Franklin's car flash at him and he assumed that a rendezvous was suggested. As was the custom, Harbison followed the Franklin car along country roads. But he became concerned when the Franklin car travelled so fast and so erratically. It gradually occurred to Harbison that the vehicle was being driven by someone other than Franklin -- likely Franklin's father, who stood opposed to Harbison's relationship with his daughter.

Finally overtaking the vehicle, Harbison left his car and approached the other car on foot. Suddenly, the car accelerated toward him. Fearing for his safety, Harbison drew his gun and fired two shots at the car's tire. The car kept coming at the defendant and he discharged three more shots in a panic while side-stepping the vehicle.

McMurray's argument also surprised James C. Fuller, Jr., who appeared as co-counsel for the defendant at trial. (Pet. App. A51) Until McMurray's reversal of course, both Fuller and McMurray had been adhering to their client's claim of self-defense. Indeed, Fuller pressed that chosen defense in his own closing argument that was delivered to the jury before McMurray's. Like Harbison, Fuller was neither consulted nor even warned about McMurray's decision to break rank and confess Harbison's guilt.

The jury evidently disagreed with the prosecution's theory of the case, for it refused to find Harbison guilty of first degree murder.[2] But the jury evidently agreed with McMurray; instructed on self-defense, the jury rejected the defense and found the defendant guilty of second degree murder and assault with a deadly weapon inflicting serious injury.[3] If the sentence Harbison received is any measure, he enjoyed no unexpected windfall from McMurray's unwanted concession of guilt. A life sentence, the sternest sentence available under North Carolina law at the time of his trial, was imposed. On direct appeal, the Supreme Court of North Carolina affirmed. See State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

In the state post-conviction proceeding, the prosecution filed no response to Harbison's allegations. The Superior Court, without holding an evidentiary hearing, simply denied Harbison's motion for appropriate relief. Still proceeding pro se, Harbison then petitioned the Supreme Court of North Carolina for review by way of writ of certiorari.[4] The Court granted the writ, appointed North Carolina's Appellate Defender to represent Harbison, and

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[2]In North Carolina, first degree murder is the unlawful killing of a human being with malice and with a specific intent to kill with premeditation and deliberation. E.g., N.C.G.S. 14-17; State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950). Second degree murder differs from first degree murder in that no specific intent, premeditation, or deliberation need be established. E.g., State v. Reynolds, 307 N.C. 184, 297 S.E.2d 532 (1982).

[3]In the assault case, the jury rejected a possible finding that Harbison intended to kill Danna Franklin.

[4]There is no right of appeal to North Carolina's appellate courts from a denial of a post-conviction motion for appropriate relief brought after the conclusion of the direct appeals process. N.C.G.S. 15A-1422(c)(3).

specified that its review would be "limited to whether trial counsel's argument to the jury constituted prejudicial error." (Pet. App. A56)

As Petitioner points out at length (Pet. at 8-10), the North Carolina State Bar conducted an independent disciplinary proceeding against McMurray while Harbison's case was pending in the Supreme Court. Omitted from the State's discussion, however, is the fact that the three-member Bar panel unanimously concluded that McMurray's alleged conduct constituted a violation of his duties under North Carolina's Code of Professional Responsibility. The Bar panel divided only on whether the alleged facts were satisfactorily established. (Pet. App. A123-A131)

Petitioner now draws liberally from evidence adduced during the Bar's proceeding, but the Supreme Court of North Carolina specifically denied Petitioner's request to make those matters part of the record.[5] (Pet. App. A139) The certified record of the case as it appeared to the Supreme Court of North Carolina, accordingly, will fail to support many of Petitioner's factual assertions and will not contain many materials now gathered in Petitioner's Appendix.

The Supreme Court of North Carolina, in a unanimous opinion, vacated Respondent's convictions and remanded the cases for a new trial. As a first step in its analysis, the Court examined McMurray's argument in light of the facts of the case and found that the closing argument was functionally equivalent to the entry of a plea of guilty to

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[5]Omitted from the Petitioner's Appendix is Harbison's response to the State's request to enlarge the record in the Supreme Court of North Carolina. Harbison opposed the request because he was not a litigant in the Bar proceeding, had no say in the conduct of that litigation, and could neither call witnesses nor proffer argument there.

the crime of manslaughter. It was a concession of guilt that was unauthorized by Harbison and in fact was contrary to his chosen plea, his chosen defense at trial, and his testimony at trial. Reasoning that a lawyer has no power or discretion to overrule a client's plea of not guilty, the Court concluded that Harbison was the victim of ineffective aassistance. 315 N.C. at 180, 337 S.E.2d at 507 (reproduced at Pet. App. A6). While "cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy," the Court nonetheless believed that such a strategy is permissible only when it is conducted with the approval of the client. "[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands." Id.

Turning to the question of prejudice, the Court found what it thought obvious -- a lawyer's unauthorized concession of his client's guilt causes a trial to lose certain of the fundamental attributes that allow us to say that a fair trial has been had:

> [W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.
>
> * * *
>
> When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id.

Harbison suffered prejudice -- as would virtually any individual standing in his shoes. He was denied advocacy of his interests, an uncompromised test of the State's case under In re Winship, 397 U.S. 358 (1970), and Mullaney v. Wilbur, 421 U.S. 684 (1975), and an uncompromised determination of his case by a jury.

The Supreme Court of North Carolina paid heed to evidence adduced at Harbison's trial and consulted its prior opinion affirming the convictions on direct appeal. 315 N.C. at 177-78, 337 S.E.2d at 505-06 (Pet. App. A2-A3). The Court likewise was aware of the unusual factual and procedural nuances in the case -- the alleged lateness of Harbison's motion and the State's claim of laches; the absence of a transcript of McMurray's closing argument and the State's corresponding claim of procedural default; the want of an evidentiary hearing in the Superior Court; the lack of findings of fact by the lower court; Harbison's reliance on only his verified pleading and Fuller's answers to interrogatories; and the Bar proceeding and the divided panel's determination.

In answer to some of the peculiar procedural and factual problems raised by the State, the Court invoked its special discretionary powers to reach the merits. Id. at 178, at 506 (Pet. App. A3-A4).

ARGUMENT

I

To the Supreme Court of North Carolina, the prejudice in this case was obvious. Respondent was denied the experience of a true adversarial trial and the right to

insist that the prosecution prove its case without the benefit of a concession of guilt to any offense charged in the bill of indictment.

In so concluding, the Supreme Court of North Carolina conducted a straightforward application of the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984), and United States v. Cronic, 466 U.S. 648 (1984). It awarded a new trial because McMurray's action transformed Harbison's trial into something less than the true adversarial proceeding contemplated by the constitution.

The operative principle that has animated this Court's Sixth Amendment analysis was stated succinctly by Justice Stevens in Cronic:

> When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

466 U.S. at 656-57 (footnotes omitted). The Supreme Court of North Carolina identified several essential attributes of a true adversarial proceeding that were missing from Harbison's trial.

A

Indispensable to a true adversarial criminal trial is loyal advocacy -- however effective -- and it was unmistakably absent at a critical point in Harbison's trial. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685.

No matter how skillful or competent, a lawyer by definition must remain the client's representative and must stand as a loyal advocate of the accused's cause and not his own. After all, the accused and not the lawyer is the party to the proceeding:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause.

Id. at 685. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" Cronic, 466 U.S. at 656 (quoting Anders v. California, 386 U.S. 738, 743 (1967)). See also Nix v. Whiteside, 54 U.S.L.W. 4194, 4196 (U.S. Feb. 26, 1986)(No. 84-1321); Cuyler v. Sullivan, 446 U.S. 335 (1980); Gedders v. United States, 425 U.S. 80 (1976).

McMurray abandoned the role of advocate and became an active and vocal adversary of Harbison's own expressed wishes and interests. To the jury, and certainly to Harbison, there arose a profound conflict of interest between client and counsel. Harbison wanted an acquittal and McMurray was asking for a conviction on a lesser offense. The scene does not resemble the true adversarial proceeding the constitution demands. An adversary was seated in the chair reserved for the loyal advocate.

B

Another sine qua non of a true adversarial proceeding is the requirement, under In re Winship and Mullaney v.

Wilbur, that the State be held to its burden of proof beyond reasonable doubt:

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656 n.19 (citations omitted)(emphasis supplied). See also Strickland, 466 U.S. at 685 ("a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding").

That fundamental attribute likewise was missing from Harbison's trial. The Supreme Court of North Carolina examined the record before it and found that McMurray's argument had an effect tantamount to the entry of a plea of guilty without Harbison's consent. 315 N.C. at 180, 337 S.E.2d at 507 (Pet. App. A6). To the Court, there appeared a reasonable probability that Harbison's issues were not resolved by an impartial jury's application of the law to the evidence. Although the jury was instructed on the law of self-defense, the Court saw no legitimate reason to believe that the jury gave self-defense an unbiased consideration in the wake of McMurray's unauthorized concession of Harbison's guilt. Although the trial court instructed the jury on the presumption of innocence and the State's burden of proof, the Supreme Court similarly saw no legitimate reason to believe that the jury fairly considered Harbison's possible innocence.

Far from ignoring the question of prejudice, the Supreme Court found it and identified it. That finding should be accorded respect consistent with the principles of federalism embodied in 28 U.S.C. 2254.[6] See Strickland, 466 U.S. at 698; see also Cabana v. Bullock, 38 Cr. L. Rptr. 3093 (U.S. Jan. 22, 1986)(No. 84-1236).

Given that finding, the Court's decision this Term in Hill v. Lockhart, 54 U.S.L.W. 4006 (U.S. Nov. 18, 1985)(No. 84-1103), proves strikingly similar to the decision below. In Hill, the principles articulated in Strickland and Cronic were applied to challenges to guilty pleas based on ineffective assistance of counsel. Speaking particularly to the second, or "prejudice," requirement of Strickland, Justice Rehnquist concluded for the majority that:

> [I]n order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

54 U.S.L.W. at 4008 (emphasis supplied)(footnote omitted).

The Supreme Court of North Carolina's decision in this case rests comfortably within Hill's ambit. The record shows beyond any doubt that Harbison insisted on pleading not guilty and insisted on going to trial. What Harbison received as a consequence of McMurray's unauthorized plea on his behalf, however, was only the hollow shell of a trial --

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[6]It is worthy of mention that the Supreme Court of North Carolina apparently believed that the effect of McMurray's argument also contravened State law principles governing an accused's rights relative to the plea. The Court pointed to the seminal North Carolina authorities on that issue -- N.C.G.S. 15A-1011 through 15A-1026 and State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980).

a proceeding where the impartial jury determination of guilty or not guilty in accordance with Mullaney v. Wilbur which Harbison sought was effectively foreclosed.

C

The Supreme Court of North Carolina also discerned yet another fundamental attribute of our criminal process that was absent from Harbison's case. As this Court's opinions teach, our constitution commands a very limited but absolutely indispensable respect for an accused's autonomy as a competent human being. That immutable respect was denied to Harbison.

Concern for essential human dignity has independent force within the Anglo-American system of criminal justice. It is a virtue that contributes to the legitimacy and integrity of our adversarial process. The constitution reserves certain core decisions to citizens and those decisions must be upheld strictly and without equivocation even when they are demonstrably unwise. While there is much to be said, for instance, in support of the adage that the litigator who represents himself has a fool for a client, it is fairly settled that a per se constitutional violation, without a need to show particular prejudice, is demonstrated where a defendant is deprived of the right of self-representation under Faretta v. California, 422 U.S. 806 (1975). "The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defence,' implies a right in the defendant to conduct his own defense, with assistance at what, after all, is his, not counsel's trial." McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)(emphasis in original). As evidenced by the Court's decision this Term in Hill v. Lockhart, a functionally

similar respect is accorded the plea decision reserved to an accused under Boykin v. Alabama, 395 U.S. 238 (1969); an involuntary plea -- however wise it might truly have been -- must be set aside if the accused would not have tendered it but for the ineffective counsel of a lawyer. See also Brookhart v. Janis, 384 U.S. 1 (1966)(counsel cannot override client's plea of not guilty by proffering functional equivalent of a plea of guilty).

Whatever autonomy the constitution guarantees to Harbison was usurped. His unequivocal plea, defense, and claim of innocence were overruled by the unsolicited fiat of his attorney. Had the true adversarial process contemplated by the constitution been at work, Harbison's expressed wishes in what, after all, was his case would have been accorded more respect.

II

To properly test Petitioner's argument, it is perhaps best to articulate two fundamentally different scenarios that Petitioner does not distinguish.

The first involves a lawyer who, without any notice to or any implicit or explicit consent from his client, concedes his client's guilt to an offense when his client steadfastly has denied any and all culpability. The second involves a lawyer who advises his client to permit a concession of some culpability in the hope of limiting the potential damage, who obtains the client's consent, and who then carries out the client's informed wishes. The former features fundamental departures from the adversarial process we expect. It is, of course, Harbison's case. The latter shows a lawyer seeking to effectuate his client's interests

within the adversarial process. It is the case that Petitioner seeks to litigate.

Petitioner's discussion of Strickland's "prejudice" requirement is premised upon the assumption that a lawyer possesses the discretion and legitimate authority to plead his client guilty to a charge even against his client's expressed wishes. That central premise is proffered rhetorically by Petitioner's consistent references to McMurray's decision to admit his client's guilt as "tactical" or "strategic." In this area of the law, such labels connote particular lines of thinking and trigger the application of particular legal doctrines. And indeed, the "tactical" label contributes precisely that disservice in Petitioner's argument.

Under Strickland and Cronic -- as well as in North Carolina under State v. Braswell, 312 N.C. 553, 324 S.E.2d 241 (1985) -- it is widely understood that lawyers enjoy considerable latitude over "tactical" matters without regard to their clients' wishes or demands. Within the "tactical" zone, only seriously egregious errors in judgment will constitute, in the first instance, ineffectiveness. And because "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial," Strickland, 466 U.S. at 693, the defendant generally should be required to prove a particular prejudice linked to the outcome of the case. So runs Petitioner's argument here.

Petitioner's argument would seem better advanced in a case where the premise fits the facts -- namely, a case in which the lawyer ineffectively advises his client to confess his guilt to a lesser offense at the conclusion of the evidence and the client consents to counsel's suggestion.

In those circumstances, the probable impact on the jury's deliberations might become the exclusive concern because the adversarial process has not been fundamentally altered. The question Petitioner presents here really might be raised in such a case.[7] But that is another case. McMurray ventured into an area where he possessed no power and no discretion. When McMurray embarked as he did, he transformed the nature of the proceedings. Petitioner's argument fails to account satisfactorily for these facts.

III

The Supreme Court of North Carolina in fact was not the first appellate court to hold, post-Strickland, that per se ineffective assistance of counsel is established when a lawyer, by way of argument to the jury, concedes his client's guilt in a manner at odds with the defendant's earlier plea of not guilty and without the client's consent. One month before Harbison's case was decided, the Supreme Court of Illinois so held in People v. Hattery, ___ Ill.2d ___, 488 N.E.2d 513 (1985), vacating a death penalty case on direct appeal.

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[7]Petitioner's Question Presented is "Whether a tactical decision made by counsel for a criminal defendant to admit, during jury argument, his client's guilt of a lesser-included offense but seek acquittal of the offense charged, constitutes a per se violation of the defendant's Sixth Amendment right to the effective assistance of counsel?"

The Illinois Court followed two federal decisions handed down before Strickland[8] and assessed the legal climate as follows:

> In similar cases, courts have held that the admission of an accused's guilt by his defense attorney violates the defendant's sixth amendment right to the effective assistance of counsel. See Mullins v. Evans (10th Cir. 1980), 622 F.2d 505; State v. Wiplinger (Minn. 1984), 343 N.W.2d 858; People v. Fisher (1982), 119 Mich. App. 445, 326 N.W.2d 537; People v. Schultz (1978), 85 Mich. App. 527, 271 N.W.2d 305; People v. Carter (1976), 41 Ill. App. 3d 425, 354 N.E.2d 482. Cf. People v. Redmond (1972), 50 Ill.2d 313, 278 N.E.2d 766 (defense counsel's closing argument in which he admitted defendant's guilt constituted denial of due process).
>
> After considering the actions of the defense counsel in the present case we are convinced that the prosecution's case was not subjected to the "meaningful adversarial testing" required by the sixth amendment. (United States v. Cronic (1984), 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 65, 666.)

Id. at ___, at 518.

Finding substantial support, as did its counterpart in North Carolina, the Illinois Supreme Court went on to reject the notion that a lawyer possesses the "tactical" or "strategic" discretion to stand in opposition to his client's plea of not guilty:

> The State argues that defense counsel's actions were sound strategic decisions because the

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[8]See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 1776 (1985); Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091 (1981).

> evidence of defendant's guilt was overwhelming. We disagree. Although counsel's strategy may have been reasonable in light of the evidence -- a point we need not consider -- it was an impermissible one. . . . Counsel may not concede his client's guilt in the hope of obtaining a more lenient sentence where a plea of not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel's strategy.

Id. at ___, at 519.[9]

Finally, the Illinois Court likewise recognized the prejudice that necessarily follows when a lawyer abandons his client's informed wishes concerning a plea of not guilty. The Court could not square the adverse implications that such action poses under Winship and Mullaney with the clear admonition in Cronic that "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy

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[9]The Illinois Supreme Court could have drawn support from other decisions that have found it fundamentally wrong for a lawyer to concede a client's guilt against the client's expressed wishes. See King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2020 (1985); Young v. Zant, 677 F.2d 792 (11th Cir. 1982); Commonwealth v. Lane, 382 A.2d 460 (Pa. 1978).

burden of proof beyond reasonable doubt." Id. at ___, at 519.[10]

IV

Important policy considerations have been cited in support of the principles enunciated in Strickland and Cronic. Petitioner believes they have been undermined by the Supreme Court of North Carolina, summarizing its concerns as follows:

> If the North Carolina Supreme Court's decision remains uncorrected any attorney error may now be fair game for inclusion in the limited category of per se violations as the lower courts use the Sixth Amendment to second-guess, on a case by case basis, those tactical decisions of defense counsel which appear unwise, regardless of whether the defendant

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[10] A strict adherance to the dictates of Winship and Mullaney is essential to the true adversarial process our constitution requires. Both United States v. Cronic, 466 U.S. 648 (1984) and Hill v. Lockhart, 54 U.S.L.W. 4006 (U.S. Nov. 18, 1985)(No. 84-1103), so attest; Winship's progeny -- and particularly Connecticut v. Johnson, 460 U.S. 73 (1983) -- are firm on the issue.

There have been some abberant decisions in the lower appellate courts, e.g. United States v. Leifried, 732 F.2d 388 (4th Cir. 1984); McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984), and they should be attributed to a failure to appreciate the deleterious implications that an unauthorized concession of guilt to any offense poses under Winship and Mullaney.

Even so, the conflict among the lower courts alleged by Petitioner seems more apparent than real. Respondent's research has revealed no appellate decision reached after the opinions were handed down in Cronic and Strickland v. Washington, 466 U.S. 668 (1984), that stands in conflict with the decision of the Supreme Court of North Carolina. The cases cited by Petitioner to show a supposed conflict are, with the exception of King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied ___ U.S. ___, 105 S.Ct. 2020 (1985), earlier cases. See Pet. at 14 n. 8, 17-18. The Eleventh Circuit granted habeas corpus relief in King on the basis of ineffective assistance and the case does not appear to present a true conflict in principle.

> was actually prejudiced. Such a [illegible] burden on the trial courts and the State since defense counsel are in sole control of the creation or prevention of such errors.

(Pet. at 15)

The Supreme Court of North Carolina did not characterize its action as "second-guessing." Like the Illinois Supreme Court in Hattery, the North Carolina Court held that a lawyer has no power to do without his client's consent what McMurray did in this case. No reasons or thought processes are "second-guessed" because they are simply irrelevant.

Nor does the Supreme Court of North Carolina's holding create an "intolerable burden" for its lower trial courts and the finality of their judgments. The holding is clear and easily followed. When applied to grant relief, it will be applied only because a defendant's plea of not guilty has been overruled by a lawyer who is unwilling to respect his client's constitutional right to elect a full adversarial trial on the merits and advocate accordingly.

Petitioner is correct, however, in noting that the prosecution is not perfectly positioned to prevent a lawyer from acting as McMurray did. But the existence of stern disciplinary rules should deter the responsible members of the profession from taking unlawful and unethical actions. In that vein, it is essential to reiterate one of the few things Petitioner neglects to mention about the North Carolina State Bar proceedings lodged against McMurray. The Bar panel unanimously held that it is a violation of the State's standards of professional conduct for a lawyer to

admit a client's guilt to any offense to a jury without the client's consent.[11] (Pet. App. A127-A128)

North Carolina lawyers will be deterred and the State's interest in the finality of its valid and fair criminal convictions will be satisfied.

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[11]The Supreme Court of North Carolina did not resort in its opinion to any canons of ethics or standards of professional conduct. The case thus does not call into question the weight that such precepts should be given in Sixth Amendment cases. Cf. Nix v. Whiteside, 54 U.S.L.W. 4194, 4196 (U.S. Feb. 26, 1986)(No. 84-5786)(reserving the question for a future case).

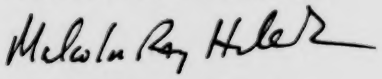
Ethical and professional norms of course were relevant to the North Carolina State Bar. The Bar panel relied upon Disciplinary Rule 7-101(A)(1) of North Carolina's Code of Professional Responsibility and Ethical Considerations 7-7 and 7-8 under the code. The disciplinary rule requires that a lawyer employ every reasonable means -- including reliance upon the presumption of innocence and the assertion of any reasonably available defense -- to achieve a client's lawful objectives. The ethical considerations, read together, make clear that it is for the client alone to decide what plea should be entered and whether an affirmative defense will be waived.

The Bar panel could have found additional support from the American Bar Association. Standard 4-5.2 of the Association's Standards for Criminal Justice (2nd ed. 1980) provides that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused . . . [including] (i) what plea to enter; (ii) whether to waive jury trial; and (iii) whether to testify in his or her own behalf." The Association's Commentary to Standard 4-5.2 pointedly notes that "in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter."

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



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